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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 123

MILLIE KRISTOF KALMANE, ALSO KNOWN AS KALMAN KRISTOF,

Appellant,

VS.

L. LAWRENCE GREEN, AS EXECUTOR OF JULIA BRAIER, ALSO KNOWN AS JULIE BRAIER.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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COURT OF APPEALS OF THE STATE OF NEW YORK

Index No. P. 2201-1949

In the Matter of the Judicial Settlement of the Account of Proceedings of L. Lawrence Green, as Executor of JULIA BRAIER, also known as JULIE BRAIER, Deceased.

MILLIE KRISTOF KALMANE, ALSO KNOWN AS KALMAN KRISTOF,

Legatee-Appellant,

L. LAWRENCE GREEN, AS EXECUTOR,

Executor-Respondent.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith her statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Court of Appeals of the State of New York entered in this cause.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 305 N. Y. 148. A copy of said opinion is attached hereto as "Appendix A". The opinion of the Surrogates Court, New York County, is not officially reported but is cited at 108 N. Y. S. 2d, 417. A copy of said opinion is attached hereto as "Appendix B".

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on March 6, 1953 and amended by order dated April 16, 1953. A petition for appeal is presented to the Court of Appeals of the State of New York herewith, to wit, on June 2, 1953. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U. S. C. § 1257.

Questions Presented

The Surrogates Court of New York County in settling the final account of the Executor ordered and decreed, without a hearing, that the money due to the sole legatee, the appellant in the above entitled cause, be deposited, pursuant to the provisions of § 269 of the Surrogates Court Act of the State of New York, with the Treasurer of the City of New York, for the account of the legatee-appellant, and further refused to order the bequest to be placed in a blocked account maintained by the Hungarian Consulate General in a domestic bank pursuant to license and authorization of the Office of Alien Property.

As the basis for his decree the Surrogate relied entirely upon a regulation issued by the Secretary of the Treasury that, with respect to checks or warrants drawn against funds of the United States in behalf of Hungarian nationals, "local conditions * * * in * * * Hungary * * * are such that there is not a reasonable assurance that a payee in those areas will actually receive" payment or be able to negotiate them "for full value". Cf. 16 F. R. 1818.

Did the Court of Appeals of the State of New York err—

1) In holding and concluding that § 269 of the Surrogates Court Act of the State of New York, aplied as described above, does not contravene the Treaty of Friendship, Commerce and Consular Rights between the United States and Hungary.

2) In holding and concluding that § 269 of the Surrogates Court Act of the State of New York, applied as described above, does not encroach upon the powers to conduct foreign relations and to regulate foreign commerce constitutionally vested in the Federal government to the exclusion of the State of New York.

3) In holding and concluding that § 269 of the Surrogates Court Act of the State of New York, applied as described above, does not invade a field already preempted by the Trading With The Enemy Act, U. S. C. A., tit. 50, Appendix § 5, Subd. (b) as amended, § 616; Executive Order No. 8389, as amended, tit. 12, U. S. C. Ann. § 95 a, Note, and applicable regulations issued thereunder by the Secretary of the Treasury (License No. 30 A, 7 F. R. 8633).

4) In holding and concluding that § 269 of the Surrogates Court Act of the State of New York, applied as described above, does not deprive the appellant of property without due process of law, despite the fact that a prior decision by the Surrogates Court had required an affirmative factual finding that distributees would not have the benefit of monies due them before directing deposit of such monies with the City Treasurer, and despite the timely objection filed by the legatee-appellant herein that in this case there has been no such proof or finding and despite the request of the legatee-appellant that the matter be set down for hearing and/or argument and submitting of memoranda and briefs.

Statutes Involved

(1) Article XXI of the Treaty of Friendship, Commerce and Consular Rights between the United States and Hungary, 44 Stat. 2441, 2459, which provides as follows:

> "A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen's Compensation Laws or other like

statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission."

Article XVIII of the same Treaty (44 Stat. 2441, 2457) provides:

> "Consular officers • • • may within their respective consular districts address the authorities • • • for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise • • • Failure upon the part of the proper authorities to grant redress • • • may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative a consul general or the consular officer stationed at the capital may apply directly to the government of the country."

Although the Treaty expired on July 5, 1952, and is no longer in effect, its provisions are here controlling since it was in force when decedent died and when the case was decided by the Surrogates Court. Cf. *Santovincenzo* v. *Egan*, 284 U. S. 30, 36, 52 S. Ct. 81, 76 L. Ed. 151. The Court of Appeals of the State of New York, decided this case on that assumption. Cf. In Re Braier's Estate, 305 N. Y. 148.

(2) Sec. 269 of the Surrogates Court Act of the State of New York, as amended, (L. 1939, ch. 34, pg 791-795) the pertinent provisions of which are as follows:

> "Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the Surrogate's Court for the benefit of such

legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto . . ."

(3) Sec. 5, subd. (b), of the Trading With The Enemy Act, as amended, U. S. C. A. tit. 50, Appendix, § 5, (b) as amended, § 616, the pertinent provisions of which provide as follows:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate or otherwise, and under such rules and regulations as he may prescribe by means of instructions, license, or otherwise——
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; * * *"

Exercising the authority vested in him by § 5 (b) of the Trading With The Enemy Act, as amended, the President issued Executive Order No. 8389, as amended, tit. 12, U. S. Code Ann. § 95 a Note, prohibiting "except as specifically authorized by the Secretary of the Treasury by means of * * * licenses, or otherwise", * * * all transactions involving property "in which any foreign country designated in this Order or any national thereof, has at any time on or since the effective date of this Order had any interest." Section 3 of the Executive Order made March 13, 1941 the "effective date of this Order * * * with respect to" nationals of Hungary.

Exercising the powers delegated to him by the President under Executive Order No. 8389, as amended, the Secretary of the Treasury on October 23, 1942, issued General License No. 30 A, 7 F. R. 8633, the pertinent provisions of which provide as follows:

> "(1) A general license is hereby granted authorizing all transactions incident to the administration of the assets situated within the United States of any blocked estate in which one of the following conditions is present:
>
> "(a) The decedent was not a national of a blocked country at the time of his death; • • • *And provided further* that any payment or distribution of any funds, securities, or other choses in action to a national of a blocked country, shall be made by deposit in a blocked account in a domestic bank, • • • (iii) under any • • • designation which clearly shows the interest therein of such national."

By Executive Order No. 9989 jurisdiction over blocked funds was transferred from the Treasury Department to the Department of Justice as of September 30, 1948. Cf. 13 F. R. 4891.

As of June 15, 1951, all the authority, rights, privileges, powers, duties and functions vested in or transferred to the Department of Justice by Executive Order No. 9989 were placed in the Office of Alien Property, Department of Justice. 16 F. R. 6895.

Statement

The decedent, Julia Braier, a resident of the State of New York, died on November 12, 1945, in Czechoslovakia.

The sole legatee was the decedent's sister, Millie Kristof Kalmane, also known as Kalman Kristof, the appellant herein, a national and resident of Hungary.

The sole asset of the estate in New York was a savings

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account, the net balance of which after deduction of expenses for administration, attorney's fees, etc., was the sum of $4,746.26.

In the course of the administration of the estate, and sometime during July, 1951, the executor-respondent submitted to the Surrogate's Court, New York County, a proposed decree to settle his account providing for payment to the sole legatee-appellant of the money due her by directing that the proceeds be deposited in a blocked account in a domestic bank in the name of the Consular Section of the Legation of the Hungarian People's Republic, the attorney in fact for and acting on behalf of the legatee-appellant.

The Surrogate refused to sign this proposed decree. Instead the Surrogate decided "that the legacy be deposited in the city treasury in accordance with § 269 of the Surrogate Court Act * * *. The decree shall be corrected accordingly and re-submitted for signature." (In Re Braier's Estate, 108 N. Y. 2d 417; Appendix B, pp. 30 and 31 infra)

In his opinion, the Surrogate declared:

> "The official policy of the United States regarding payments to persons resident in Hungary is set forth in the regulation of the Treasury Department promulgated on February 27, 1951 (16 Fed. Reg. 1818). That regulation declared: '* * * that there is not a reasonable assurance that a payee in these areas will actually receive checks or warrants drawn against funds of the United States * * *, and be able to negotiate the same for full value.'"

The court quoted and relied upon the above declaration of the Secretary of the Treasury concerning warrants drawn against *funds of the United States.* (Supp. No. 7 to Department Circular 655; our emphasis)

The declaration of the Secretary of the Treasury was made pursuant to authority vested in him in P.L. No. 828,

§ 5, 54 Stat. 1086, 31 U.S.C.A. § 123 (Approved October 9, 1940). That statute reads:

> "Hereafter no check or warrant drawn against funds of the United States or any agency or instrumentality thereof, shall be sent from the United States (including its territories and possessions) for delivery in a foreign country, in any case in which the Secretary of the Treasury determines the postal, transportation or banking facilities in general, or local conditions in a country to which such check or warrant is to be delivered, are such that there is not a reasonable assurance that the payee will actually receive such check or warrant and be able to negotiate the same for full value."

On November 3, 1951, the executor-respondent resubmitted a proposed decree in conformity with the directive of the Surrogate.

The Appellant objected to that portion of the proposed decree re-submitted by the executor-respondent, which provided for depositing the money in the hands of the executor with the Treasurer of the City of New York. Appellant proposed instead that the money due the legatee "be deposited in a blocked account maintained by the Hungarian Consulate General in the City of New York, successor to the Consular Section of the Legation of the Hungarian People's Republic, in a domestic bank pursuant to license and authorization of the Office of Alien Property." Cf. "Objections to Proposed Decree on Accounting", copy of which it attached hereto as Appendix C, in which was set forth all the federal constitutional questions raised on this appeal.

On November 27, 1951, the Surrogate ordered and decreed that the money be deposited with the Treasury of the City of New York in accordance with the provisions of § 269 of the Surrogate's Court Act and refused to incorporate the substitute proposal made by the legatee-appellant.

The Surrogate also refused appellant's request for a hearing on the fact issue to determine whether the legatee would or would not receive her full distributive share and get the full value thereof (Objections to Proposed Decree on Accounting, Appendix C).

On December 13, 1951, appellant appealed to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from that portion of the decree of the Surrogate which ordered the executor to deposit the money due to the legatee with the Treasurer of the City of New York and from the refusal of the Surrogate to incorporate in said decree her substitute proposal that the executor deposit the money in a blocked account maintained by the Hungarian Consulate General in the City of New York in a domestic bank pursuant to license and authorization of the Office of Alien Property. All the Federal Constitutional questions raised on this appeal were presented in appellant's Brief filed with the Appellate Division.

On April 29, 1952, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, affirmed the decree of the Surrogate without opinion. 279 App. Div. 1008, 113 N.Y. Supp. 2d 246.

On July 10, 1952 appellant appealed to the Court of Appeals of the State of New York from the order of the Appellate Division affirming the decree of the Surrogate and from the refusal of the Appellate Division to order the executor to deposit the monies due to the legatee in a blocked account maintained by the Hungarian Consulate General. The appeal was taken "as of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution . . . of the United

States, . . ." (Article 6, Sec. 7, Constitution of the State of New York; Civil Practice Act of the State of New York, Sec. 588.)

On March 5, 1953, the Court of Appeals affirmed the order of the Appellate Division. 305 N.Y. 148, 111 N.E. 2d 424. The judgment of the Court of Appeals was entered on March 6, 1953.

On March 27, 1953, appellant moved the Court of Appeals to amend its judgment "by including therein or adding thereto a certificate or other statement that in the determination of this case this Court was required to and did decide the Federal and constitutional questions presented in legatee-appellant's Notice of Appeal and briefs herein and argued upon the appeal by the said legatee-appellant, . . ." In support of the motion amending the judgment the attorney for the legatee-appellant filed an affidavit in which he stated as follows: "Such amendment is advisable in order that the legatee-appellant might have every opportunity to present to the Supreme Court of the United States her contentions with respect to those Federal and constitutional questions for the purpose of obtaining from the United States Supreme Court a final determination whether the decree entered by the Surrogate's Court, New York County, invades the rights of the legatee-appellant under the Constitution of the United States and the Treaty of Friendship, Commerce and Consular Rights between the United States and Hungary."

On April 16, 1953, the Court of Appeals granted said motion by ordering that its judgment "be amended by addition of the following:

> "Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz., whether section 269 of the Surrogate's Court Act, as here applied, violated (1) Article VI, clause 2, (2) Article 1, section 8, clause 3, (3) Article II, section 2,

clause 2, of the Federal Constitution or (4) deprived appellant of property without due process in derogation of the Fourteenth Amendment of the Constitution. This Court decided that that statute, as here invoked, did not violate any of the above provisions of the Constitution."

A certified copy of said order is annexed hereto as Appendix D.

The Questions Are Substantial

The issues in this appeal have international implications since they affect treaty relations between the United States and another friendly government, involving, specifically the recognition of the consular rights of the foreign government. Moreover, since there is involved the transmission of private funds into the territory of a foreign government, the appeal will decide the extent to which New York or any other state may interfere with the power of the federal government to conduct relations and regulate commerce with a foreign government with which the United States has diplomatic relations.

The instant appeal represents the first test of the constitutionality of § 269 of the Surrogate's Court Act of the State of New York (L. 1939, ch. 34, pg. 791-795, p. 4-5 supra) as applied below. There are many estates involving in their totality substantial sums of money in which "blocked" nationals have interests similar to the appellant herein. These are not confined to New York. Several states have statutes exactly alike or similar to § 269 of the Surrogate's Court Act of the State of New York. There has been an increasing tendency by the state courts to apply these statutes in the same manner as the New York courts have applied § 269 in this case.

1. The decision of the court conflicts with the Treaty of Friendship, Commerce and Consular Rights between the

United States and Hungary in violation of Article VI, Clause 2, of the Constitution.

Article XXI of the above described Treaty, 44 Stat. 2441, 2459 (p. 3-4, supra) provides as follows:

> **"A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making the distribution through him reasonable evidence of such remission."**

Article VI, Clause 2, of the Constitution makes the treaty "the supreme Law of the Land • • •;" and provides that "the Judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It is well settled law that no state can detract from the force and effect of a treaty made by the United States Government and that any state law conflicting with the provisions of a treaty must yield to the treaty. Cf. *Hines* v. *Davidowitz*, 30 F. Supp. 470, affd. 312 U.S. 52; *Santovincenzo* v. *Egan*, 52 S. Ct. 81, 284 U.S. 30; *Clark* v. *Allen*, 331 U.S. 503, 67 S. Ct. 1431.

The court below, however, decided that the surrogate's application of § 269 which denied to the Hungarian Consular officer the right to receipt for funds in behalf of the legatee-appellant did not contravene the treaty. The court held as follows:

> **"A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in**

process of probate • • • *provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees*". (Emphasis supplied.) By the proviso just quoted, the consular officer must be in a position to "remit" the funds in question "to the proper distributees". That cannot, of of course, be done in this case. The law of this country, as previously noted, expressly bars export of the funds. (Appendix A)

The decision of the court below is in direct conflict with the regulatory scheme of the federal government which allows distribution of the assets of a blocked estate to the person entitled thereto by deposit in a blocked account in a domestic bank under any designation which clearly shows the interest of such national. (General License No. 30 A, 7 F.R. 8633; p. 6 supra) Export of funds is no prerequisite to their distribution or remission. "Distribution" is the phrase used by the Federal Government in General License No. 30 A supra, issued by the Office of Alien Property. "Remission" is the word used in Article XXI of the Treaty, 44 Stat. 2441, 2459, p. 3-4 (supra). Their meaning is identical. "The reasonable evidence of such remission" which the Treaty requires the Consul to furnish to the court in the case of a "blocked" distributive share is merely that he has deposited it in a blocked account pursuant to license requirements. That is the only remission to the distributee which the laws of the United States permit and the only method of remission which the Consul can be expected to make. That the United States considers such a deposit in a blocked account to be distribution of the assets to the person entitled thereto is proved by the language of General License No. 30 A (supra) which provides as follows:

"(1) A general license is hereby granted authorizing all transactions incident to the administration of the

assets situated within the United States of any blocked estate in which one of the following conditions is present:

"(a) The decedent was not a national of a blocked country at the time of his death; • • • *And provided further* that any payment or distribution of any funds, securities, or other choses in action to a national of a blocked country, shall be made by deposit in a blocked account in a domestic bank, • • • (iii) under any • • • designation which clearly shows the interest therein of such national."

Moreover, the fact is that the consular sections of the legations of blocked countries, including the Consular Section of the Legation of Hungary, maintain blocked accounts in their names in behalf of their absent heirs with the consent and authorization of the Office of Alien Property.

The reliance of the Court below on a prior decision In Re Plemich, (176 Misc. 560, 561; 28 N. Y. S. 2d 86, 88,) emphasizes the nature and cause of its error. In Re Plemich was decided on May 21, 1941, at which time General License No. 30 A had not yet been issued. Executive Order No. 8389 (12 U. S. C. A. 95 (a) Note) prohibits any and all transaction of blocked funds unless licensed. Prior to the issuance of General License No. 30 A on October 23, 1942, there was no general license relating to distribution of the assets of blocked estates. Since the issuance of General License No. 30 A (which was subsequent to the decision of In Re Plemich, supra) distribution of blocked funds in the manner proved for by the provisions of that license is permitted.

2. The decision of the court below encroaches upon Federal power to conduct foreign relations and to regulate commerce with foreign nations in violation of Article I, Sec. 8, Clause 3 of the Constitution. Section 269 as applied by the surrogate is not an exercise of state power over the

administration of estates. The surrogate's refusal to permit the Hungarian Consular officer to be the receiving agent of the assets is based solely on the fact that the legatee-appellant is a Hungarian national. The surrogate's prohibition applies universally to all nationals of that country. Thus the intrusion of the surrogate into the field of foreign relations is indeed very direct.

Inherent in the very structure of our system of government is the proposition that foreign relations and the regulation of foreign commerce has been exclusively committed to the national government. In *Hines* v. *Davidowitz* (supra) the Supreme Court stated:

> "The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power'. *Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.* As Mr. Justice Miller well observed of a California statute burdening immigation:
>
> "'If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?'" (Citing in footnote *Chy Lung* v. *Freeman*, 92 U. S. 275, 279, 23 L. Ed. 550, and Alexander Hamilton in Federalist paper No. 80, "*The peace of the whole ought not to be left at the disposal of the part. The Union will undoubtedly be answerable to foreign powers for the conduct* of its members". * * * (Emphasis and parentheses supplied.)

3. The court below erred in deciding that § 269, as applied

by the surrogate, "• • • treated matter beyond and outside the scope of federal law" and therefore that "• • • the New York provision could not have been preempted by the national enactment." (Appendix A.)

The national enactment to which the court made reference is Sec. 5, subd (b) of the Trading With The Enemy Act, as amended (50 U. S. C. A. § 5 (b) as amended, § 616) as implemented by Executive Order No. 8389, supra and General License No. 30 A supra.

As the court itself observed:

> "A note appended to section 269, indicative of its design, see Matter of Pelcyger, 171 Misc. 1016, 1017, 14 N. Y. S. 2d 190, 191, recites that it shall apply 'where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part.' L. 1939, ch. 343, note; see, also, Note, 17 N. Y. U. L. Q. Rev., pp. 314-316; cf. Opton, Legacies to Foreign Residents and the New Amendment to Section 269, Surrogate's Court Act, N. Y. L. J., Sept. 21, 1939, p. 728, Col. 1." (Appendix p. 25).

But it is the Trading With The Enemy Act which by blocking the funds makes impossible "confiscation in whole or in part" by any one outside the United States, and within the limits imposed by United States law, guarantees that the property will be disposed of in accordance with the wishes of the decedent. As has already been pointed out above, the surrogate's refusal to permit the Hungarian Consular Officer to be the receiving agent in behalf of the legatee-appellant is based solely on the fact that the legatee is a Hungarian national. That is the precise purpose and effect of the Trading With the Enemy Act. Sec. 269 as applied below therefore invades a field over which the federal government has jurisdiction and in which it has already enacted legislation. Cf. *Monongahela Bridge Co.* v.

U. S., 216 U. S. 177, 30 S. Ct. 356; Second Employers' Liability Cases, 223 U. S. 1, 53, 32 S. Ct. 169.

4. The court below erred in finding that the surrogate had not denied appellant of property without due process in derogation of the Fourteenth Amendment of the Constitution.

The court stated as follows:

> "The Consular Section raised only issues of law, and the hearing of such questions upon appeal affords a full measure of due process." (Appendix A)

The record indicates clearly that the appellant raised the fact issues required to be found by § 269 as a prerequisite to the application of the statute. Moreover, the fact issues were raised in a form consistent with prior decisions dealing with the same question. In Section 3 of her Objections to Proposed Decree on Accounting (Appendix C) the appellant stated as follows:

> "Under Section 269 'an obligation was imposed upon the court * * * to direct deposit with the city treasurer' only in those situations were there is 'an *affirmative factual finding* * * * that the distributees would not' get the money. (Our emphasis.) *Matter of Blasi*, 173 Misc. 587, 588. Here there has been no proof and no finding."

This was one of several objections made by appellant to the proposed decree submitted by the executor at the direction of the surrogate and in support of appellant's substitute proposal that the surrogate order the money to be deposited in a blocked account maintained by the Hungarian Consulate General in a domestic bank pursuant to license and authorization of the Office of Alien Property. Moreover, the appellant requested the surrogate either to incorporate her substitute proposals in his decree, "or else that the matter be set down for hearing and/or argument

and submitting of memoranda and briefs." (Objections to Proposed Decree on Accounting, Appendix C, p. 33, infra.)

In support of the application of § 269 to the present case, the surrogate relied entirely on the United States Treasury Department's conclusion—contained in its Regulation of February, 1951—that, with respect to checks or warrants drawn against funds of the United States in favor of Hungarian nationals, "local conditions * * * in * * * Hungary * * * are such that there is not a reasonable assurance that a payee in those areas will actually receive" payment or be able to negotiate them "for full value" 16 Federal Register 1818, amdg. Code of Fed. Reg. (1949 ed.) tit. 31, § 211.3, subd. (a).

The court below found proper the surrogate's reliance upon the United States Treasury Department's conclusion. Under these circumstances, the decision of the court that appellant may still have a hearing by application to the surrogate and that "the assurance of such a hearing fully satisfies the demands of due process" suggests that appellant's right to a hearing can be satisfied by the form rather than the substance of due process. There is nothing to indicate that at such a future hearing the surrogate will do anything different than he has already done, i.e. rely upon the conclusion of the Treasury Department, or that the court below will, upon another appeal, consider such reliance by the surrogate to be improper.

The declaration of the Secretary of the Treasury has no relation to distributive shares in estates.

Public Law No. 828, 31 U. S. C. A. § 123, provides:

> "Hereafter no check or warrant drawn against funds of the United States, or any agency or instrumentality thereof, shall be sent from the United States * * * for delivery in a foreign country in any case in which the Secretary of the Treasury determines that postal, transportation, or banking facilities in general, or local

conditions in the country to which such check or warrant is to be delivered, are such that there is not a reasonable assurance that the payee will actually receive such check or warrant and be able to negotiate the same for full value."

Under this enabling legislation the Secretary of the Treasury claimed to have found that "postal transportation or banking facilities in general or local conditions in * * * Hungary are such that there is not a reasonable assurance that a payee * * * would actually receive checks or warrants drawn against funds of the United States * * * and be able to negotiate the same for full value".

In accordance with his delegated authority, the finding of the Secretary of the Treasury is obviously limited to "funds of the United States" which are within his official control. It is obvious that he was not delegated to make any findings concerning *private funds* belonging to nationals of another country which were never the property of the United States, and over which the Secretary of the Treasury never had control.

Additionally, to relate the declaration of the Secretary of the Treasury to distributive shares of estates would imply that the Federal Government had acted twice in this field, once under the regulations under Executive Order 8389 and again under the determination of the Secretary of the Treasury.

It is further rather obvious that to enlarge this delegation to the Secretary of the Treasury to make a finding into any "official policy" of the United States Government regarding all payments to nationals of other countries would make it clearly an unlawful and unconstitutional delegation of legislative power. Not only the wording of the enabling legislation but the very simple logic of the situation precludes any such interpretation, for so to do would mean to

renounce a treaty by the finding of an administrative agency in an unrelated field.

It is clear that the presumed determination of the Secretary of the Treasury is unrelated to distributive shares of foreign nationals in American estates.

Moreover, as a finding of fact, the conclusion of the Secretary of the Treasury is clearly not binding on the court or on the parties to the proceeding.

> "The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, with no Executive department of the government is constitutionally or practically equipped to discharge. * * * No Executive action can deprive the court of jurisdiction—or even constitute evidence of rights in the property—except in so far as such rights depend on the settlement of 'political' questions, as on issues of sovereignty of a party or his assignor." Sullivan v. State of Sao Paulo 122 F. (2d) 355 (C.C.A. 2, 1941)

In *Banca de Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438 (C.C.A. 2, 1940), the validity of a purchase of silver by the United States from the Government of Spain was in issue. The court refused to be bound by the presence in the record of an affidavit by Secretary of the Treasury in which he "asserted that he had accepted and acted upon the representations of title and full power to sell made by the Ambassador on behalf * * * of the Spanish government". The court stated, 114 F. (2d) 438, 442:

> "We do not believe the acts of Secretary Morgenthau in accepting the representations of the Spanish Ambassador are binding upon the courts on a controversy as to the validity of a purchase of property by the United States which does not affect the international or diplomatic relations of our government, but turns rather on the effect of local law on the vendor's title. The courts will leave for the Executive the determination of all

'political' issues; in the international field this means such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property."

It is clear from the foregoing that the finding of the Treasury Department (and we do not at this time raise the question of due process and/or notice and hearing and the findings of subsidiary facts to substantiate the ultimate conclusion of the Secretary of the Treasury in connection with his findings) is not such a finding as precludes the court from making its own independent findings. The court had no right to preclude itself by virtue of a finding of the Secretary of the Treasury in another area from making its own findings here after a hearing.

It might parenthetically be pointed out that even as to the funds over which the Secretary of the Treasury could regulate it was contemplated that any such payee could seek to have the regulation modified as concerns his check. Report No. 2177 of the Senate Committee of Finance submitted and accompany S 4353 Cal. No. 2296, 76th Congress, 3rd Session, entitled Regulation of Delivery of Certain Checks to Foreign Countries, etc., states:

> "The bill would authorize the deposit of the proceeds of such checks in an account in the Treasury *subject to claim by the payees upon the establishment of ownership and a showing that checks in the payment of such claims could actually be delivered to the payees and negotiated by them for full value.*" (Emphasis supplied.)

Certainly it was not intended that ten years later the pronouncement of the Secretary of the Treasury should deprive an owner of funds which are not government funds of the opportunity to prove that he or she will actually receive the moneys.

Finally, legatee-appellant has been deprived of a sub-

stantial property right—the right to apply for and thus to receive from the Office of Alien Property a license to unblock her distributive share of the estate.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

WOLF, POPPER, ROSS, WOLF & JONES,
Counsel for Legatee-Appellant.

By MARTIN POPPER.

APPENDIX "A"

OPINION OF THE COURT OF APPEALS OF NEW YORK IN RE BRAIER'S ESTATE

March 5, 1953

Before Chief Judge Loughran and Judges Lewis, Conway, Desmond, Dye, Froessel and Fuld.

Wolf, Popper, Ross, Wolf & Jones. Martin Popper, Paul L. Ross and David Sloane, for appellant.

Charles Ettinger and L. Lawrence Green, in person, for L. Lawrence Green, respondent.

The Opinion of the Court was delivered by Fuld, J.

[1] Julia Braier, a resident of New York County, died in Czechoslovakia in the fall of 1945, bequeathing her entire estate—which consisted of a savings account in a New York city bank—to her sister, a national and resident of Hungary. In settling the final account of her executor, the surrogate directed that the bequest be deposited, pursuant to the provisions of section 269 of the Surrogate's Court Act, with the Treasurer of the City of New York, for the account of the legatee, and also prohibited withdrawals except on further court order. Whether that disposition was warranted, or whether—as urged by the Consular Section of the Hungarian Legation appearing as attorney in fact for the legatee—those funds should have been placed "in a blocked account" maintained by the Hungarian Consulate General in a domestic bank, is the question presented. And, since the Appellate Division's determination necessarily rests on a decision of constitutional issues, the appeal is properly here as of right. Civil Practice Act, § 588 Subd. 1; see, also Cohen & Karger, Powers of the New York Court of Appeals, § 57, pp. 257-258.

Section 269 of the Surrogate's Court Act, upon which the surrogate relied, provides that, "Where it shall appear that a legatee • • • would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that

such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee". Contrary to appellant's contentions, that statute is valid; it may not be stricken as unconstitutional, upon the ground (1) that subdivision (b) of section 5 of the federal Trading with the Enemy Act, U.S.C.A., tit. 50, Appendix, § 5 subd. (b), as amended, § 616, assertedly pre-empting the field, precludes local legislation such as section 269; (2) that it contravenes the Treaty between the United States and Hungary; or (3) that it encroaches upon federal power over foreign commerce. We consider each of those grounds.

Section 5, subdivision (b), of the Trading with the Enemy Act grants to the President "During the time of war or * * * national emergency" the power to "regulate * * * or prohibit, any acquisition holding, withholding, use, transfer * * * importation or exportation of * * * any property in which any foreign country or a national thereof has any interest" except "upon such terms and conditions as [he] may prescribe". Exercising this authority, the President, in April of 1940, issued Executive Order No. 8389, tit. 12 United States Code Ann. § 95a note, Code of Fed. Reg., Cum. Supp., tit. 3, p. 645; prohibiting, "except as specifically authorized", all transactions involving property "in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest". Section 3 made March 13, 1941 the "effective date of this order * * * with respect to" nationals of Hungary.

[2-5] This federal regulatory scheme, it is self-evident, serves a purpose entirely unrelated to the goal of the New York provision. The national enactment seeks to "check * * * trading with the enemy. Its prime purpose is to stop such uses of foreign property rights as might imperil national defense." *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N.Y. 332, 337, 43 N. E. 2d 345, 347; see, also, *Alexewicz* v. *General Aniline & Film Corp.*, 181 Misc. 181, 186, 43 N.Y.S. 2d 713, 719. Section 269 of the Surrogate's Court Act, in contrast, aims "to promote the basic object and obligation of Courts of decedent devolu-

tion to use their utmost endeavors to effectuate the express or implied wishes of a decedent respecting the disposal of his assets on death." Matter of Weidberg, 172 Misc. 524, 528, 15 N.Y.S. 2d 252, 256. A note appended to section 269, indicative of its design, see Matter of Pelcyger, 171 Misc. 1016, 1017, 14 N.Y.S. 2d 190, 191, recites that it shall apply "where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part." L. 1939, ch. 343, note; see, also, Note, 17 N.Y.U.L.Q. Rev., pp. 314-316; cf. Opton, Legacies to Foreign Residents and the New Amendment to Section 269, Surrogate's Court Act, N.Y.L.J., Sept. 21, 1939, p. 728, col. 1. Since section 269 treats a matter beyond and outside the scope of the federal law, the area covered by the New York provision could not have been preempted by the national enactment. See Maurer v. Hamilton, 309 U.S. 598, 602, et seq., 60 S. Ct. 726, 84 L. Ed. 969; Kelly v. Washington, 302 U.S. 1, 4 et seq., 8, 58 S. Ct. 87, 82, L. Ed. 3; People v. County Transp. Co., 303 N.Y. 391, 396, 402, 103 N.E. 2d 421, 424, 428.

Not only do the two provisions treat variant problems, but equally important, their application—as illustrated by the case before us—in no way conflicts. As the Consular Section concedes, Executive Order No. 8389 bars delivery of the bequest to the foreign legatee, requiring, instead, its deposit "in a blocked account in a domestic bank or with a public officer, agency, or instrumentality designated by a court having jurisdiction of the estate". Public Circular No. 20, issued Oct. 23, 1942, Code of Fed. Reg., Cum. Supp., Tit. 31, p. 8926, explaining General License 30A, Code of Fed. Reg., Cum. Supp., Tit. 31, § 131.30a, issued under Executive Order No. 8389. Achieving exactly the same result, the surrogate herein relied on section 269 to direct deposit of the bequest with the city treasurer. And this action has been approved by the very official charged with effectuating the goals of the federal statute; he wrote, in response to the executor's request for a license to transfer the bequest to the city treasurer, that "It would be in accordance with the policy of this Office to issue such a license". Since a state provision "will be stricken only if—

in terms or in practical administration—it conflicts with the Federal law or infringes on its policy", it necessarily follows that section 269 may stand along with subdivision (b) of section 5 of the Trading with the Enemy Act. Quaker Oats Co. v. City of New York, 295 N.Y. 527, 534, 68 N.E. 2d 593, 595, affirmed sub nom. Hill Packing Co. v. City of New York, 331 U.S. 787, 67 S. Ct. 1314, 91 L. Ed. 1817; see, also, Union Brokerage Co. v. Jensen, 322 U.S. 202, 64 S. Ct. 967, 88 L. Ed. 1227; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754; Kelly v. Washington, supra, 302 U.S. 1, 58 S. Ct. 87; Gilbert v. State of Minnesota, 254 U. S. 325, 41 S. Ct. 125, 65 L. Ed. 287.

[6] Nor does the surrogate's application of section 269 contravene provisions of the Treaty between this government and Hungary.[1] Nothing contained in that Treaty compels, or even sanctions, transfer of the bequest to the Hungarian Consular officer. Article XXI of the Treaty, 44 U.S. Stat. 2459,—the article relied on by appellant—recites: "A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate • • • *provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees*". (Emphasis supplied.) By the proviso just quoted, the consular officer must be in a position to "remit" the funds in question "to the proper distributees". That cannot, of course, be done in this case. The law of this country, as previously noted, expressly bars export of the funds. Indeed, when, on another occasion, the Hungarian Consul asserted his rights under the Treaty, the court decided against him, saying that, by reason of the freezing order, "there is an inference that if the share were paid to the Consul it would not reach the distributee himself." Matter of Plemich, 176 Misc. 560, 561, 28 N.Y.S. 2d 86, 88; see, also, Matter of Yee Yoke Ban, 200 Misc. 499,

[1] Although the Treaty expired on July 5, 1952, see State Department Bulletin, Vol. XVIII, No. 455, pp. 382-383; Vol. XXV, No. 629, pp. 95-96; Vol. XXV, No. 649, p. 914; Vol. XXVI, No. 667, p. 946, and is no longer in effect, we have assumed that its provisions are here controlling, since it was in force when the case was denied by the surrogate. Cf. *Santovincenzo* v. *Egan*, 284 U.S. 30, 36, 52 S. Ct. 81, 76 L. Ed. 151.

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500, 107 N.Y.S. 2d 221, 222. Since, then, the Consular Section could not "remit • • • to the proper distributees"—to use the language of the Treaty—article XXI did not require that the funds be deposited in its name. It follows, therefore, that deposit of the bequest with the city treasurer, pursuant to section 269, in no way conflicts with the rights of either Consular Section or legatee under the Treaty.

[7, 8] We must likewise reject the contention that the New York statutory provision encroaches on national power "To regulate Commerce with foreign Nations". U.S. Const. art. I, § 8. This state adopted section 269 to insure the intended distribution of estates administered by its courts. "• • • every state • • • possesses [the power] of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament". Mager v. Grima, 8 How. [U.S.] 490, 493, 12 L. Ed. 1168. Incident to that power, each "State establishes the procedure governing the probate of wills and the processes of administration." Lyeth v. Hoey, 305 U.S. 188, 193, 59 S. Ct. 155, 158, 83 L. Ed. 119. Barring any "overriding federal policy," that state procedure should be honored. See Clark v. Allen, 331, U.S. 503, 517, 67 S. Ct. 1431, 1439, 91 L. Ed 1633; see, also, Irving Trust Co. v. Day, 314 U.S. 556, 62 S. Ct. 398, 86 L. Ed. 452; Rocca v. Thompson, 223 U.S. 317, 32 S. Ct. 207, 56 L. Ed. 453; Matter of D'Adamo, 212 N.Y. 214, 106 N.E. 81, L.R.A. 1915D, 373; Matter of Deyo, 180 Misc. 32, 39, 42 N.Y.S. 2d 379.

Thus, absent any clash with national policy, the Supreme Court has upheld the right of a state (1) to impose a special tax on legacies to aliens, see Mager v. Grima, supra, 8 How. [U. S.] 490, 12 L. Ed. 1168; (2) to limit the right of foreign consuls to administer estates of their nationals, see Rocca v. Thompson, supra, 223 U. S. 317, 32 S. Ct. 207; see, also, Matter of D'Adamo, supra, 212 N. Y. 214, 106 N. E. 81; (3) to grant aliens an unqualified right to inherit property within its borders, see Blythe v. Hinckley, 180 U. S. 333, 21 S. Ct. 390, 45 L. Ed. 557; or (4) to make that right dependent on existence of a reciprocal right on the part of United States citizens in the alien's country. See Clark v.

Allen, supra, 331 U. S. 503, 516-517, 67 S. Ct. 1431. Section 269 stands as a like exercise of state power over the administration of estates.

[9] Concluding, then, that section 269 does not offend against any constitutional provision, we consider whether the surrogate properly applied the statute. The fact that this bequest consisted of "blocked funds" does not mean, as appellant argues, that section 269 is not needed. Since federal blocking regulations depend on considerations of national defense, the freezing order might conceivably be lifted, without assurance that the legatee would receive the funds. Section 269 is the means, in such a case, of assuring transmission of the bequest to its proper owner.

Moreover, the surrogate noted and properly relied upon the United States Treasury Department's conclusion—contained in its Regulation of February, 1951—that, with respect to checks or warrants drawn against funds of the United States in favor of Hungarian nationals, "local conditions • • • in • • • Hungary • • • are such that there is not a reasonable assurance that a payee in those areas will actually receive" payment or be able to negotiate them "for full value" 16 Federal Register 1818, amdg. Code of Fed. Reg. (1949 ed.) tit. 31 § 211.3, subd. (a). That regulation was made, it should be noted with the benefit of all the sources of information concerning conditions in Hungary that are available to a department of the federal government and not to the surrogate. Nor may the finding be limited to government checks or notes, for a check drawn on government funds would be no less likely to reach an Hungarian payee than would a draft on any private account. The authoritative conclusion reached by the Treasury Department, therefore, was directly relevant to the surrogate's determination, under section 269, that the legatee would not have the "benefit or use or control of the money" or that "other special circumstances [made] it appear desirable that such payment should be withheld". Similar Treasury findings have been relied on to withhold and deposit, under the New York statute, bequests made to citizens, not only of Hungary, Matter of Getream, 200 Misc. 543, 107 N. Y. S. 2d 225, but Russia, Matter of Best, 200 Misc. 332, 107 N. Y. S. 2d 224, Lithuania, Matter of

Geffen, 199 Misc. 856, 104 N. Y. S. 2d 490, the Republic of China, Matter of Yee Yoke Ban, supra, 200 Misc. 499, 500, 107 N. Y. S. 2d 221, 222, and Occupied Norway, Matter of Ramberg, 174 Misc. 306, 20 N. Y. S. 2d 619. As in those cases, so here, the Treasury's finding supplies sufficient basis in fact for the application of section 269.

[10] And, finally, to the plaint that the surrogate violated the demands of due process by failing to grant a hearing, there are several answers.

In the first place, the legatee has not been deprived of her property. Concededly, she has title to the bequest; it has been set aside for her benefit and account, and is hers for the asking when reasonable assurance is given that she will receive it. As one court put it, section 269, "far from constituting an impairment of [her] rights, was designed as and in fact is, a potent protector thereof." Matter of Weidberg, supra, 172 Misc. 524, 531, 15 N. Y. S. 2d 252, 259. Nor is her right to possession postponed. Quite apart from the fact that Executive Order No. 8389 would, in any event, have compelled deposit of the bequest in a blocked account, the surrogate actually concluded that, because of conditions in Hungary, the probability was that, even if the funds had been transmitted to Hungary, the legatee would not have received them. As soon as conditions in that country change—and the laws of our government permit unblocking of the funds belonging to an Hungarian national—the surrogate will undoubtedly order the funds withdrawn from the city treasury and transmitted to the legatee. Manifestly, section 269 was designed, and was here invoked, to protect the legatee's property and to insure that she receives it.

In the second place, there has in no event been denial of due process. The Consular Section raised only issues of law, and the hearing of such questions upon appeal affords a full measure of due process. See American Surety Co. of New York v. Baldwin, 287 U. S. 156, 168, 53 S. Ct. 98, 77 L. Ed. 231; York v. State of Texas, 137 U. S. 15, 20, 11 S. Ct. 9, 34 L. Ed. 604; see, also Phillips v. Commissioner, 283 U. S. 589, 596-597, 51 S. Ct. 608, 75 L. Ed. 1289. At no point did appellant deny the fact—indicated by the Treasury Department in its 1951 regulation, 16 Federal Register 1818, amdg. Code of Fed. Reg. (1949 ed.) tit. 31 § 211.3,

subd. (a)—that conditions in Hungary negate the likelihood that the legatee would receive her bequest, and at no time during the pendency of the proceeding in the Surrogate's Court was a hearing sought on that issue.

Moreover, and of transcendent importance, appellant may still have a hearing on that question. Under the decree before us, the Consular Section is privileged to apply at any time to the surrogate for an order permitting it to withdraw the funds in question from the city treasury. See Matter of Landau, 187 Misc. 925, 66 N. Y. S. 2d 16; Matter of Alexandroff, Sur., 61 N. Y. S. 2d 866. And, upon such application, it may show that conditions in Hungary justify the belief that the legatee will receive her bequest. The assurance of such a hearing fully satisfies the demands of due process. Cf. Chase Securities Corp. v. Donaldson, 325 U. S. 304, 309, n. 5, par. 2, 65 S. Ct. 1137, 89 L. Ed. 1628; American Surety Co. v. Baldwin, supra, 287 U. S. 156, 168, 53 S. Ct. 98; York v. Texas, supra, 137 U. S. 15, 20, 11 S. Ct. 9.

The order should be affirmed, with costs.

Loughran, C. J., and Lewis, Conway, Desmond, Dye and Froessel, JJ., concur.

Order affirmed.

APPENDIX "B"

Opinion of the Surrogates Court, New York County

By Hon. Surrogate William T. Collons

In Re Braier's Estate

Published in the New York Law Journal, October 30, 1951

Wolf, Popper, Ross, Wolf & Jones. Martin Popper, Paul L. Ross and David Sloane, for Appellant.

Charles Ettinger and L. Lawrence Green, in person, for L. Lawrence Green, Respondent.

Estate of Julia Braier—The proposed decree settling the account of the executor provides for payment to the sole

legatee who is a national and resident of Hungary by directing that the proceeds be deposited in a blocked account in a domestic bank in the name of the attorney-in-fact for the legatee if the executor procures the requisite license from the United States Department of Justice. The official policy of the United States regarding payments to persons resident in Hungary is set forth in the regulation of the Treasury Department promulgated on February 27, 1951 (16 Fed. Reg., 1818). That regulation declared: "* * * that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States * * *, and be able to negotiate the same for full value." In the circumstances, the court directs that the legacy be deposited in the city treasury in accordance with section 269 of the Surrogate's Court Act (In re Geffin's Estate, 104 N. Y. S. 2d 490; Matter of Thomae, N. Y. L. J., June 25, 1951, p. 2339, and Matter of Best, N. Y. L. J., July 5, 1951, p. 24). Compensation of the executor for legal services rendered by him and of the attorneys for the attorney-in-fact fixed. The decree shall be corrected accordingly and resubmitted for signature.

APPENDIX "C"

OBJECTIONS TO PROPOSED DECREE ON ACCOUNTING

Surrogate's Court,
New York County
[Same Title]

SIR:

Please take notice that the undersigned object to that portion of the proposed decree herein contained in the next to the last paragraph which provides for depositing the then remaining balance of $4746.26 in the hands of the executor with the Treasurer of the City of New York for the account of the sole legatee herein, Millie Kristof Kalmane, also known as Kalman Kristof, in accordance with the provisions of Section 269 of the Surrogate's Court Act and that no

withdrawal shall be made therefrom except upon further order of the court, and in its stead propose that the paragraph read:

> "And it is further ordered, adjudged and decreed that after making the foregoing payments, deposit the balance in cash then remaining in the hands of the Executor in the sum of Four Thousand Seven Hundred Forty-Six and 26/100 ($4,746.26) Dollars be deposited in a blocked account maintained by the Hungarian Consulate General in the City of New York in a domestic bank pursuant to license and authorization of the Office of Alien Property."

The following is an enumeration of our reasons:

1. The funds due the sole legatee herein are "blocked" funds and are properly subject to the provisions of the Trading with the Enemy Act and executive orders and licenses pursuant thereto. Since federal law has preempted the field, state law such as the provisions of Section 269 of the Surrogate's Court Act should not be applied in derogation thereof.

2. Section 269 is inapplicable. If the funds herein are deposited in a blocked account pursuant to the provisions of the Trading with the Enemy Act, from which account they cannot be released except upon the authorization of an agency of the Federal Government, then there is no question of their going to any government which allegedly "confiscate", and therefore are beyond the import of Section 269. The purpose of Section 269 is to authorize the deposit where transmission or payment in a foreign country "might be circumvented by confiscation in whole or in part." Blocked funds are not transmitted to a foreign country and cannot be confiscated.

3. Under Section 269 "an obligation was imposed upon the court • • • to direct deposit with the city treasurer" only in those situations where there is "an *affirmative factual finding* • • • that the distributees would not" get the money. (Our emphasis.) *Matter of Blasi*, 172 Misc. 587, 588. Here there has been no proof and no finding.

4. Section 269 is unconstitutional in that it invades a province which under the Constitution of the United States is reserved for Congressional legislation only.

5. Section 269 as applied in the instant case is unconstitutional since it contravenes the provisions of the Treaty of Peace and Friendship between Hungary and the United States.

6. The regulations of the Treasury Department, namely, Supplement 7 of Circular 655 referred to in the decision of the court herein does not set forth "the official policy of the United States regarding payments to persons resident in Hungary" but relates solely to Social Security benefits payable by the United States Government and therefore wholly to monies which are monies of the United States Government over which the Secretary of the Treasury has been given disposition.

7. The inclusion of Hungary in Supplement 7 of Circular 655 of the Treasury Department is based purely on the rate of exchange between the countries and other considerations, and has no bearing on whether recipients of benefits actually receive the monies.

It is respectfully urged that the proposal herein be incorporated into the decree or else that the matter be set down for hearing and/or argument and submitting of memoranda and briefs.

WOLF, POPPER, ROSS & WOLF,
Attorneys for Hungarian Consulate
General in City of New York,
Office and Post Office Address,
160 Broadway,
Borough of Manhattan,
New York 38, New York.

To:

L. LAWRENCE GREEN,
Executor,
580 Fifth Avenue,
New York, New York

CLERK OF THE SURROGATE'S COURT,
New York County.

APPENDIX "D"

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals of the State of New York, held at Court of Appeals Hall in the City of Albany, on the sixteenth day of April, A. D. 1953.

Present, Hon. Edmund H. Lewis, Senior Associate Judge, Presiding.

Mo. No. 201

In the Matter of the Judicial Settlement of the Account of Proceedings of L. Lawrence Green, as Executor of Julia Braier, also known as Julie Braier, Deceased.

MILLIE KRISTOF KALMANE, ALSO KNOWN AS KALMAN KRISTOF,

Appellant,

L. LAWRENCE GREEN, AS EXECUTOR,

Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by the addition of the following:

> Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz., whether section 269 of the Surrogate's Court Act, as here applied, violated (1) Article VI, clause 2, (2) Article 1, section 8, clause 3, (3) Article II, section 2, clause 2, of the Federal Constitution or (4) deprived appellant of property without due process in derogation of the Fourteenth Amendment of the Constitution. This Court decided that that statute, as here invoked, did not violate any of the above provisions of the Constitution.

And the Surrogates' Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

GEARON KIMBALL,
Deputy Clerk.

[SEAL.]

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